Newsletter

Superannuation Contributions

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PGS Superannuation Consulting Pty Ltd

Ph: 07 3901 7210
Fx: 07 3102 6131
Mob 0403 222 143

ABN 35090921618
petergskinner@optusnet.com.au

PO Box 3131
Norman Park
QLD 4170

Abstract

This newsletter addresses the issues associated with superannuation when the period of marriage and superannuation membership do not align. As they are rarely in alignment, this newsletter offers a solution to one of the most common problems faced by practitioners.

When the Period of Scheme Membership differs from Period of Marriage

One of the most common issues faced when dealing with superannuation is how to account for the difference in the scheme membership to that of the period of marriage/cohabitation. Precedent cases are limited, there is no guidance in the Regulations[1] and yet it is one of the most important variables that determine the size of the property pool in respect of superannuation. There are widespread differences in approach amongst practitioners yet these differences are rarely justified.

This newsletter examines the superannuation issues when time in marriage does not coincide with time in the superannuation fund.

Points in Time

There are normally 4 discrete dates that are relevant to this issue.

- Join date of superannuation fund
- Marriage/co-habitation date
- Separation date
- Current date

In almost all property matters, there is a period of time between separation and the current date. At the very least, this difference should be quantified. The less common situation arises when the superannuation fund membership commenced before the marriage. The most complex is where there are both pre marriage and post marriage contributions. For clarity of analysis, 3 scenarios will be addressed.

- **Scenario One: - Post marriage contributions.** The issue is how to account for post separation contributions and earnings after separation. This scenario is the most common and pre marriage issues would not be relevant if the member had joined the superannuation fund after marriage.

[1] Family Law (Superannuation) Regulations 2001

- **Scenario Two: - Pre marriage contributions.** In this scenario, the member would have bought superannuation into the marriage. The issue is how to account for the value of the superannuation at the time of the marriage noting that it would have grown substantially since marriage.
- **Scenario Three: - Post and pre marriage contributions.** A combination of the above.

Superannuation is Different! – Another species of assets

This was the essence of full court decision in C& C[2] where the majority endorsed the two pool approach with superannuation in one pool and general assets in the second pool. One of the characteristics that define superannuation is that is lends itself to a relatively precise value as determined by Regulations[3] at any point in time. Unlike the family home, it does not have to be sold for a precise value to be determined and the increment in value between two points can be readily determined. That is not to say that the value derived by Regulations is not subject to challenge but that is another newsletter. Indeed, C & C invited an assessment of the nature, form and characteristics of superannuation in terms of s 75 (2) factor. For the purposes of this newsletter, we will assume that the client's family law value has no characteristics that would sustain any s 75(2) adjustment.

It is the quantification that superannuation affords that facilitates a universal solution.

Solution to Scenario One: - Post marriage contributions.

Let us suppose that the husband's superannuation at time of separation was $400,000 and had grown to $600,000 as of today. What is an equitable base amount today given a 50% split?

The concept is relatively straightforward. We place the wife in the same position she would have been in if it had been possible to split the superannuation at the time of separation and give her the interest that would have accrued between separation and today. This gives the post separation contributions and earnings to the husband yet does not disadvantage the wife because she has received the interest that she would have had in any event.
This is a neutral solution, as it does not favour either party.

The interest calculated for the wife depends on the superannuation scheme. For accumulation schemes, it is the crediting rate of the fund. Defined benefit schemes are slightly more complex. Most use the prescribed interest rate to index the base amount, which is based on AWOTE (a wage index) plus 2.5%. The rate is currently about 7.5%. However, the Commonwealth schemes have their own arrangement[4] because these schemes are largely unfunded. For these schemes, the funded component grows at the crediting rate of the fund but the majority, being the unfunded component, grows at the long-term bond rate.

Solution to Scenario Two: - Pre marriage contributions

Let us suppose that the husband's current superannuation is valued at $600,000, and that he joined the fund 20 years ago. He was married 15 years ago. What adjustment should be made for the superannuation that he bought into the marriage?

In the past, many would have used West and Green[5] approach, which is a straight-line apportionment so that 5/20th would have been excluded, or $150,000. This would give an equitable outcome if superannuation grew proportionately each year. It does not, particularly for defined benefit schemes. Less accrues in the early years so a West and Green approach would overstate the amount of superannuation bought into the marriage.[6]

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[2] C& C [2005] FamCA 429 (per Bryant CJ, Finn, Coleman, Warnick and O'Ryan JJ)

[3] Family Law (Superannuation) Regulations 2001

[4] Eg, Superannuation (Family Law – Superannuation Act 1976) Orders 2004

[5] West and Green (1993) FLC 92-395

[6] The disadvantages of the West and Green approach are further discussed in T & T 2006 FamCA 207, paragraphs 161 to 170

The neutral solution would be to obtain a family law valuation (FLV) at the time of marriage. The issue now is that FLV is relevant to prices prevailing some 15 years ago. Then, petrol was only 48 cents! To allow it to be compared with the current day FLV of $600,000, the value 15 years ago needs to be brought up to current day values by the application of the consumer price index. So if the FLV then was $50,000, and applying the consumer price index, the $50,000 would become say $88,000. This allows like to be compared with like and the contributions for pre marriage super would be $88,000.

The solution to scenario three is a combination of the above two solutions.

Summary

The above approach to determine superannuation attributable to the marriage is an economic approach. It is based on facts and is equitable to both parties. It should be the approach when both parties engage a single expert witness. In common with most property adjustments, any 75(2) adjustments should be made after the facts are established. The potential criticism of the approach is that it is too mathematical. However, without evidence, there is always a risk that your client may be disadvantaged.

Another consideration is that the above approach avoids "double dipping" where overall adjustments might be made both in respect of contributions and as a s 75(2) factor. This featured in W & W[7] where the full court remitted the case for rehearing and said at paragraph 39, "…highlights the need for caution when considering the operations of s 75 (2) with respect to superannuation entitlements…"

Precedent cases

Whilst some general guidance can be derived from precedent cases, superannuation and family law is too new for the above to be endorsed by past cases. Practitioners might wish to refer to the following selected cases.

- C & C[8] - the majority of the full court said (at paragraph 66) that in the context of considering contributions… the following matters may be relevant:
    - The relationship between years of fund membership and cohabitation.
    - The actual contributions made by the fund member at the commencement of cohabitation (if applicable), at separation and at the date of hearing.
- W & W[9] – the full court said at paragraph 25, "…the increase in the value of the husband's superannuation between separation and trial and the reasons for that increase were important matters." The trial Judge was found to have erred in failing to give weight to the increase in the husband's superannuation interest between separation and trial and the husband's contribution to that increase.
- T & T[10] - an interesting analysis of the above issues. Significantly, no evidence was tendered of the FLV at date of marriage.

Feedback

Your views on this newsletter would be most appreciated. Other newsletters can be found at www.pgsSuperannuation.com.au

Peter Skinner FCPA

Director

[7] W & W [2005] FamCA 430

[8] C & C, op cit

[9] W & W, op cit

[10] T & T 2006 FamCA 207